

file



**Before The
State Of Wisconsin
DIVISION OF HEARINGS AND APPEALS**

Application of Steve Schwahn for a Permit to
Reconstruct a Solid Pier on the Bed of Long Lake,
Town of Long Lake, Washburn County, Wisconsin

Case No. 3-NO-98-66037ST

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Steve Schwahn applied to the Department of Natural Resources for a permit to extensively repair an existing, non-conforming rock crib pier in Long Lake. The Department issued a Notice of Proposed Pier which stated that unless written objection was made within 30 days of publication of the Notice, the Department might issue a decision on the permit without a hearing. The Department of Natural Resources opposes the reconstruction of this pier as proposed. By letter dated June 17, 1998, Steve Schwahn, by his Attorney John E. Joyce, requested a contested hearing.

On January 28, 1999, the Department filed a Request for Hearing with the Division of Hearings and Appeals. Pursuant to due notice a hearing was held on May 13, 1999, in Shell Lake, Wisconsin. Mark J. Kaiser, Administrative Law Judge (ALJ), presiding. The parties filed written argument after the hearing. The last brief was received on June 15, 1999.

In accordance with secs. 227.47 and 227.53(1)(c), Stats., the PARTIES to this proceeding are certified as follows:

Steve Schwahn, Applicant, by

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Menomonie, WI 54751

Wisconsin Department of Natural Resources, by

Attorney Michael D. Scott
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APPLICABLE LAW

Section 30.13(1), Stats., provides:

A riparian proprietor may construct a wharf or pier in a navigable waterway extending beyond the ordinary high-water mark or an established bulkhead line in aid of navigation without obtaining a permit under s. 30.12 if all of the following conditions are met:

- (a) The wharf or pier does not interfere with public rights in navigable waters.
- (b) The wharf or pier does not interfere with rights of other riparian proprietors.
- (c) The wharf or pier does not extend beyond any pierhead line which is established under sub. (3).
- (d) The wharf or pier does not violate any ordinances enacted under sub. (2).
- (e) The wharf or pier is constructed to allow the free movement of water underneath and in a manner which will not cause the formation of land upon the bed of the waterway.

Sections 30.12(1) and (2), Stats., provide in relevant part:

(1) General prohibition. Except as provided under sub. (4), unless a permit has been granted by the department pursuant to statute or the legislature has otherwise authorized structures or deposits in navigable waters, it is unlawful:

(a) To deposit any material or to place any structure upon the bed of any navigable water where no bulkhead line has been established;

...

(2) Permits to place structures or deposits in navigable waters; generally The department, upon application and after proceeding in accordance with s. 30.02 (3) and (4), may grant to any riparian owner a permit to build or maintain for the owner's use a structure otherwise prohibited under sub. (1), if the structure does not materially obstruct navigation . . . and is not detrimental to the public interest.

Sec. 30.122, Stats provides:

All permanent alterations, deposits or structures affecting navigable waters, other than boathouses, which were constructed before December 9, 1977 and which did not require a permit at the time of construction, shall be presumed in conformity with the law, unless a written complaint is filed within 180 days of December 9, 1977. Upon the filing of a complaint, the department shall proceed with an action to enforce the applicable statutes.

FINDINGS OF FACT

1. Steve Schwahn owns real property located in the S ½ of the SE ¼ of Section 23, Township 37 North, Range 11 West, in the Town of Long Lake, Washburn County. The

property abuts Long Lake which is navigable in fact. The property is located along the south shore of Long Lake. Steve Schwahn is a riparian owner on Long Lake.

2. The property owned by Steve Schwahn was originally purchased by his grandfather and has been in his family since prior to 1890. There has been a pier at the same location and generally the same size and configuration as the one which is the subject of this hearing since approximately 1910.

3. The existing pier is 44 feet long and twelve feet wide. It extends to a water depth of approximately 3 ½ feet. The pier consists of a wood deck placed on wood pilings with rocks piled between the pilings beneath the pier. The pier is a permanent structure.

4. The existing pier was constructed in 1968 and is in poor condition. Many of the wood components are rotting and Mr. Schwahn has considered the pier unsafe for use since 1997.

5. By application dated March 5, 1998, Steve Schwahn applied to the Department of Natural Resources (the Department) for a permit to "repair and [renovate the] existing pier." The diagram included in the application shows a fifty foot long pier which would be larger than the existing pier. At the hearing, the applicant stated that it is not his intention to enlarge the existing pier and to the extent that the application depicts a larger pier it is in error. The Department and the applicants have fulfilled all procedural requirements of secs. 30.12 and 30.02, Stats.

6. The work necessary to make the existing pier safe for use constitutes a reconstruction, not a repair, of the existing pier. A permit pursuant to sec. 30.12, Stats., is required for the proposed reconstruction of the pier.

7. The pier was apparently originally rebuilt in 1968 and as proposed to be reconstructed will have two rows of abutting wood pilings running the length of the pier. These rows of wood pilings along with the rocks piled beneath the pier will restrict the free movement of water beneath the pier when it is rebuilt.

8. The subject pier is located approximately in the middle of the 5000 feet of frontage owned by Steve Schwahn. Neither the existing pier nor the proposed reconstructed pier will interfere with the rights of any other riparians.

9. Steve Schwahn owns three boats that are typically kept in a boathouse located at a different area of his lake frontage. The pier is used mainly for the loading and unloading of passengers, not for the mooring of boats. When asked at the hearing why he was seeking a permit for a pier this size, Mr. Schwahn answered simply because it has always been there. The reconstructed pier is of a width which exceeds the Department's reasonable use guidelines. Without a justifiable need for a pier this wide it constitutes an unnecessary and excessive consumption of public lakebed for a private use and as such is detrimental to the public interest in Long Lake.

10. The Department's fisheries biologist for the area testified that Long Lake is one of the better fisheries in northern Wisconsin and that the general area at which the subject pier is located is a walleye and white sucker spawning area. Another Department witness testified that in general the near shore area of a lake is an important corridor area where wildlife finds food. These are general reasons for limiting the size and number of piers; however, there was no evidence that the habitat affected by the proposed pier is unique or rare on Long Lake.

The fisheries biologist testified that if the support pilings for the pier were abutting as proposed, fingerlings would not be able to use the area beneath the pier. Considering the size of this pier relative to the amount of frontage owned by Steve Schwahn, this impact is *de minimus*. With respect to wildlife, the witness testified that a solid pier would create an obstacle for animals traveling through the near shore corridor. This is true, but it is an unavoidable impact of piers of any width. The fact that a pier of comparable size and configuration has been located at this site since 1910 without identifiable negative consequences for wildlife indicates there will be no significant negative impacts for wildlife resulting from the proposed pier.

11. The proposed project will not adversely affect water quality nor will it increase water pollution in Long Lake. The project will not cause environmental pollution as defined in sec. 299.01(4), Stats.

12. The Department of Natural Resources has complied with the procedural requirements of sec. 1.11, Stats., and Ch. NR 150, Wis. Adm. Code, regarding assessment of environmental impact.

DISCUSSION

The facts in this case are straightforward and relatively undisputed. The issues in this case are mainly legal. As a riparian, Steve Schwahn is entitled to place a pier on the bed of Long Lake adjacent to his property as an aide of navigation without obtaining a permit from the Department if the conditions set forth at sec. 30.13(1)(a) through (e), Stats., are all met. As found above, the proposed pier does not meet two of the listed conditions. Specifically, based upon its size, the pier interferes with public rights in Long Lake and so; therefore, does not meet condition sec. 30.13(1)(a), Stats., and the pier as proposed to be reconstructed will not allow the free movement of water underneath the pier and; therefore, does not meet the condition sec. 30.13(1)(e), Stats. Since the proposed pier does not meet all of the conditions set forth at sec. 30.13(1)(a) through (e), Stats., it cannot be constructed without a permit.

Alternatively, Mr. Schwahn argues that since the pier was constructed prior to December 9, 1997, it can be maintained pursuant to sec. 30.122, Stats. Section 30.122, Stats., provides that structures constructed before December 9, 1997, and which did not require a permit at the time of construction, shall be presumed in conformity with the law, unless a written complaint is filed within 180 days of December 9, 1997. The question is whether the proposed project constitutes the repair or maintenance of an existing structure or constitutes the reconstruction of an existing pier. Although there is no case law interpreting sec. 30.122, Stats., or legislative history describing the legislature's intent in enacting this statute, the apparent purpose of the statute is to allow riparians to continue to use a structure which under current law cannot be permitted but

was lawful at the time it was constructed. However, once the structure deteriorates to the point where it is no longer usable, the riparian cannot construct another unlawful structure but must comply with existing laws.

The Department has not promulgated any rules with respect to piers defining what constitutes a lawful repair and what would be considered a reconstruction; however, a common standard is that repairs costing up to fifty percent of the fair market or replacement cost of a nonconforming structure are allowable while repairs in excess of fifty percent constitutes a replacement or reconstruction of a nonconforming structure. For example, sec. 59.69(10)(a), Stats., requires that county zoning ordinances must adhere to the following:

An ordinance enacted under this section may not prohibit the continuance of the lawful use of any building or premises for any trade or industry for which such building or premises is used at the time that the ordinances take effect, but the alteration of, or addition to, or repair in excess of 50% of its assessed value of any existing building or structure for the purpose of carrying on any prohibited trade or new industry within the district where such buildings or structures are located, may be prohibited. The continuance of the nonconforming use of a temporary structure may be prohibited. If the nonconforming use is discontinued for a period of 12 months, any future use of the building and premises shall conform to the ordinance.

Similarly, sec. 62.23(7)(h), Stats., defining cities' zoning powers provides:

The lawful use of a building or premises existing at the time of the adoption or amendment of a zoning ordinance may be continued although such use does not conform with the provisions of the ordinance. Such nonconforming use may not be extended. The total structural repairs or alterations in such a nonconforming building shall not during its life exceed 50 per cent of the assessed value of the building unless permanently changed to a conforming use. If such nonconforming use is discontinued for a period of 12 months, any future use of the building and premises shall conform to the ordinance.

And, the Department in its regulation of boathouses allows riparians to repair and maintain existing boathouses if the cost of the repairs or maintenance does not exceed fifty percent of the equalized assessed value of the boathouse. Sec. 30.121(3), Stats.

The record does not contain any estimates of the cost of the proposed work or the replacement cost of the existing pier, however, based upon the amount of the structure that needs to be replaced, repair costs clearly would exceed fifty percent of the replacement cost of the existing pier.

Finally, one must consider whether a permit pursuant to sec. 30.12, Stats., can be issued for this pier. As found, the width of the existing and proposed pier exceed the department's reasonable use guidelines. Although these guidelines do not have the force of law, they do constitute a reasonable starting point in evaluating a proposed pier. It becomes the burden of the applicant to justify why a pier wider than that set forth in the guidelines is necessary. In this case, the applicant did not have a specific reason why a pier of this size is needed and there is no

apparent reason in the record for allowing a pier in excess of the width set forth in the Department's reasonable use guidelines.

Although it is found that the proposed pier is detrimental to the public interest in Long Lake based upon its excessive width, it should be noted that the fact situation in this case is relatively unique. Steve Schwahn is a riparian with 5000 feet of frontage. Upon this frontage, he currently has one boathouse and the pier that is the subject of this hearing. According to the Department's reasonable use guidelines, he would be allowed berthing space for 101 boats. He is asking for far less. The fact that this amount of frontage contains only one boathouse and one pier benefits the public interest in Long Lake. If Steve Schwahn had a reason for seeking a permit for a pier wider than the recommendation in the Department's reasonable use guidelines, it would be relatively easy to grant this request. However, Steve Schwahn's only stated reason for seeking a pier twelve feet wide was the there had always been a pier that width at this site. This is not a justifiable basis for exceeding the reasonable use guidelines. The Department's denial of Steve Schwahn's application for a permit to reconstruct his existing pier must be affirmed.

CONCLUSIONS OF LAW

1. The applicant is a riparian owner within the meaning of sec. 30.12, Stats.
2. The proposed pier described in the Findings of Fact constitutes a structure within the meaning of sec. 30.12, Stats.
3. The project is a type III action under sec. NR 150.03(8)(f)4, Wis. Adm. Code. Type III actions do not require the preparation of a formal environmental impact assessment.
4. The proposed pier does not constitute an impairment to navigation but is "detrimental to the public interest in navigable waters" within the meaning of sec. 30.12(2), Stats.
5. The existing pier was constructed prior to December 9, 1977, and can be maintained without a permit pursuant to sec. 30.122, Stats. However, the extent of work proposed to be performed constitutes reconstruction, not repair, of the pier. Therefore, a permit pursuant to sec. 30.12, Stats., is required for the proposed pier.
6. Pursuant to secs. 30.12 and 30.13, Stats., a permit is required for the proposed pier.
7. Pursuant to secs. 30.02 and 227.43(1)(b), Stats., the Division of Hearings and Appeals has the authority to issue the following order.

ORDER

The application submitted by Steve Schwahn for a permit to reconstruct an existing pier is denied.

Dated at Madison, Wisconsin on July 16, 1999.

STATE OF WISCONSIN
DIVISION OF HEARINGS AND APPEALS
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By Mark Kaiser
MARK J. KAISER
ADMINISTRATIVE LAW JUDGE

NOTICE

Set out below is a list of alternative methods available to persons who may desire to obtain review of the attached decision of the Administrative Law Judge. This notice is provided to insure compliance with sec. 227.48, Stats., and sets out the rights of any party to this proceeding to petition for rehearing and administrative or judicial review of an adverse decision.

1. Any party to this proceeding adversely affected by the decision attached hereto has the right within twenty (20) days after entry of the decision, to petition the secretary of the Department of Natural Resources for review of the decision as provided by Wisconsin Administrative Code NR 2.20. A petition for review under this section is not a prerequisite for judicial review under secs. 227.52 and 227.53, Stats.

2. Any person aggrieved by the attached order may within twenty (20) days after service of such order or decision file with the Department of Natural Resources a written petition for rehearing pursuant to sec. 227.49, Stats. Rehearing may only be granted for those reasons set out in sec. 227.49(3), Stats. A petition under this section is not a prerequisite for judicial review under secs. 227.52 and 227.53, Stats.

3. Any person aggrieved by the attached decision which adversely affects the substantial interests of such person by action or inaction, affirmative or negative in form is entitled to judicial review by filing a petition therefor in accordance with the provisions of sec. 227.52 and 227.53, Stats. Said petition must be filed within thirty (30) days after service of the agency decision sought to be reviewed. If a rehearing is requested as noted in paragraph (2) above, any party seeking judicial review shall serve and file a petition for review within thirty (30) days after service of the order disposing of the rehearing application or within thirty (30) days after final disposition by operation of law. Since the decision of the Administrative Law Judge in the attached order is by law a decision of the Department of Natural Resources, any petition for judicial review shall name the Department of Natural Resources as the respondent. Persons desiring to file for judicial review are advised to closely examine all provisions of secs. 227.52 and 227.53, Stats., to insure strict compliance with all its requirements.